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No. ICC-01/12-01/18

Date: 22 January 2020

TRIAL CHAMBER X

Before: Judge Kimberly Prost, Single Judge

SITUATION IN THE REPUBLIC OF MALI

**IN THE CASE OF
*THE PROSECUTOR v. AL HASSAN AG ABDOUL AZIZ AG MOHAMED AG
MAHMOUD***

Public

**Decision on Prosecution request for a variation of time limits relating to the
disclosure of evidence and scheduling a second status conference**

Decision to be notified in accordance with Regulation 31 of the *Regulations of the Court* to:

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Other

Judge Kimberly Prost, acting as Single Judge of Trial Chamber X (the ‘Single Judge’ and ‘Chamber’, respectively) of the International Criminal Court (the ‘Court’), in the case of *The Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, issues this ‘Decision on Prosecution request for a variation of time limits relating to the disclosure of evidence and scheduling a second status conference’.

I. Procedural history

1. On 30 December 2019, having considered written and oral submissions, the Single Judge rendered a ‘Decision on the evidence disclosure protocol and other related matters’ (the ‘Decision’), in which she, *inter alia*: (i) adopted the redaction regime to be applied during the trial phase of the proceedings; and (ii) put in place a procedure and set time limits for the review of existing redactions and the re-disclosure of material in lesser redacted forms.¹
2. On 6 January 2020, the Chamber issued a decision setting the commencement date of the trial on 14 July 2020 and adopting a calendar leading up to this date. It notably set 14 April 2020 as the deadline for the Prosecution to finalise its evidence disclosure.²
3. On 14 January 2020, and pursuant to Regulation 35 of the Regulations of the Court (the ‘Regulations’), the Prosecution filed a request to vary the time limits set in the Decision for the review of redactions applied to the evidence disclosed and other related tasks (the ‘Prosecution Request’).³ By way of this request, the Prosecution seeks that the following time limits be extended until 16 March 2020: (i) 10 February 2020 – deadline to conduct a review and report on non-standard redactions; (ii) 10 February 2020 – deadline to file application to maintain any such redaction, where relevant pursuant to Regulation 42 of the Regulations; and (iii) 24 February 2020 – deadline to conduct a review and report on standard categories B.2 and B.3 redactions, applied to identifying

¹ ICC-01/12-01/18-546.

² Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548.

³ Prosecution’s request for extension of time limits in the *Decision on the evidence disclosure protocol and other related matters*, ICC-01/12-01/18-552-Conf-Exp. The confidential and public redacted versions of this request were notified the next day (ICC-01/12-01/18-552-Conf-Red and ICC-01/12-01/18-552-Red2).

information of family members of witnesses or other persons (together, the ‘Time Limits’).

4. On 17 January 2020, in accordance the Single Judge’s directives pursuant to Regulation 34 of the Regulations,⁴ the Defence filed a response (the ‘Response’) opposing the Prosecution Request which, it argues, does not show that good cause exists for the extension of time sought.⁵ The Defence further contends that a variation of the Time Limits would render it ‘impossible for the Defence to prepare in an effective manner before the commencement of trial’.⁶ It is the Defence’s view that, ‘given that the reasons underpinning the Request are squarely attributed to a lack of diligence on the part of the Prosecution’, any delay in the commencement of the trial should trigger Mr Al Hassan’s right to be released pursuant to Article 60(4) of the Rome Statute (the ‘Statute’).⁷

II. Submissions and analysis

5. Pursuant to Regulation 35 of the Regulations, the Single Judge will assess whether good cause has been shown to extend the Time Limits.
6. To that effect, the Single Judge first notes that, as submitted by the Defence,⁸ the Prosecution does not rely on new facts or changes in circumstances. Instead, the Prosecution argues that the extension of time sought is reasonable and that there exists good cause since the additional time requested is ‘necessary to enable the Prosecution to complete the ordered tasks’.⁹
7. In support, the Prosecution submits that the volume of material and amount of work involved simply make it unfeasible for the Prosecution to comply with the Time Limits.¹⁰ Notably, the Prosecution explains that a total of over

⁴ E-mail from the Single Judge to the parties and participants on 15 January 2020 at 16:29.

⁵ Response to ‘Confidential redacted version of “Prosecution’s request for extension of time limits in the Decision on the evidence disclosure protocol and other related matters”, 14 January 2020, ICC-01/12-01/18-552-Conf-exp’, ICC-01/12-01/18-554-Conf-Exp, with four confidential, *ex parte*, annexes. A public redacted version of the Response was filed on 20 January 2020 (ICC-01/12-01/18-554-Red).

⁶ Response, ICC-01/12-01/18-554-Red, para. 2, with paras 25-37.

⁷ Response, ICC-01/12-01/18-554-Red, para. 2, with paras 25-29 and 37.

⁸ Response, ICC-01/12-01/18-554-Red, para. 2.

⁹ Prosecution Request, ICC-01/12-01/18-552-Red2, para. 4.

¹⁰ Prosecution Request, ICC-01/12-01/18-552-Red2, paras 15-33.

40,000 redaction boxes were applied on more than 5,000 pages of material and that these redactions are distributed amongst more than 1,000 of the documents disclosed so far.¹¹ In addition to the redactions applied to material already disclosed, the Prosecution further submits that the Time Limits apply to its review of witness-related material newly obtained, as well as other forms of exception to disclosure.¹² This concerns material which it was authorised not to disclose, notably the evidence of witnesses for whom an anonymous summary was disclosed rather than their statement or transcript of interview.¹³ Moreover, the Prosecution explains how the bulk of the ordered tasks require individualised attention and manual efforts and therefore argues that, as a result, they are necessarily resource-intensive and time-consuming tasks.¹⁴

8. The Defence argues that the Prosecution has submitted ‘no clear or convincing arguments as to why it is unable to comply with the review deadlines established by the Single Judge’.¹⁵ In its Response, the Defence submits that the Prosecution had sufficient time to conduct the review and that the Prosecution should have organised its pre-trial preparation in such a manner that it would be positioned to execute the required tasks rapidly after confirmation.¹⁶ The Defence notably identifies what it terms an excessive level of redactions as a reason which cannot justify delaying disclosure to the Defence at this stage and further takes issue with the Prosecution having spent time and resources in post-confirmation incriminatory investigations.¹⁷
9. Concerning the volume of existing redactions under review, and on the basis of alleged inconsistencies in the Prosecution’s submissions, the Defence also appears to suggest that the Prosecution has ‘change[d] its positions or modif[ied] disclosure data and information in order to achieve a desired outcome’.¹⁸ In this regard, the Single Judge observes that the Prosecution’s

¹¹ Prosecution Request, ICC-01/12-01/18-552-Red2, para. 18.

¹² Prosecution Request, ICC-01/12-01/18-552-Red2, paras 20-21 and 27.

¹³ Prosecution Request, ICC-01/12-01/18-552-Red2, paras 21 and 27.

¹⁴ Prosecution Request, ICC-01/12-01/18-552-Red2, paras 23-30.

¹⁵ Response, ICC-01/12-01/18-554-Red, para. 7.

¹⁶ Response, ICC-01/12-01/18-554-Red, notably paras 10-24.

¹⁷ Response, ICC-01/12-01/18-554-Red, paras 10-24.

¹⁸ Response, ICC-01/12-01/18-554-Red, paras 8-9.

initial oral submission that the volume of non-standard redactions was ‘very limited’¹⁹ concerned strictly, as requested, redactions applied pursuant to category B.5 and, as such, and in conformity with the procedure adopted by the Pre-Trial Chamber, did not concern non-disclosure of witnesses’ identities.²⁰ The Single Judge also recalls that most of the ordered review concerns existing redactions to identifying information of Prosecution witnesses, notably but not exclusively, pursuant to Regulation 42.²¹ Accordingly, while the Prosecution Request provides additional and detailed information on the implementation of the Decision and corresponding volume of material to be reviewed, there is no information before the Single Judge to indicate that the Prosecution provided inconsistent or misleading information to the Chamber for its consideration.

10. Having found that the Prosecution has provided sufficient reasons that objectively justify its inability to comply with the Time Limits, the Single Judge considers that the requirement for an extension of time under the first sentence of Regulation 35(2) is met since good cause has been shown. In the instant case, the Single Judge appreciates that the Prosecution has competing deadlines and priorities in the upcoming months and notwithstanding the efforts already made to meet the deadlines set, a few more weeks will be necessary to comply with its related obligations. This includes the review of all relevant material as well as the preparation of corresponding applications, disclosure notes, and reports to the Chamber.
11. The Single Judge appreciates the submissions made to the effect that the review of redactions is to be conducted alongside witness management efforts. In particular, the Single Judge notes that delays in organising meetings with witnesses are primarily from reasons outside the Prosecution’s direct control and necessarily impacts its ability to meet the Time Limits, notably the review

¹⁹ Transcript of hearing on 12 December 2019, ICC-01/12-01/18-T-008, p. 23, lines 13-15.

²⁰ Pre-Trial Chamber I, Decision on the Evidence Disclosure Protocol and Other Related Matters, 16 May 2019, ICC-01/12-01/18-31-tENG-Corr, para. 33.

²¹ Concerning the Defence submission on the presence of ‘code F’ redactions in the material disclosed (*see* Response, ICC-01/12-01/18-554-Red, para. 8 and Annex B), the Single Judge observes that this code appears to have notably been used by the Prosecution to identify redactions applied to the identity of witnesses after discrete applications were granted by the relevant chamber. Accordingly, and to the extent that the corresponding redactions were judicially authorised, the Single Judge does not find the use of this code, as such, to be problematic.

of both standard and non-standard redactions applied, as authorised, to identifying information of protected witnesses and their relatives.

12. The Single Judge also takes into account the various measures adopted by the Prosecution to expedite the review required.²² While recognising the amount of work that the review implies, the Single Judge however underlines that the Prosecution has been on notice that the case was moving to trial since 30 September 2019, when the charges were confirmed by the Pre-Trial Chamber. The Single Judge considers that the Prosecution was therefore already aware that the preparation of lesser redacted versions of its evidence would be required and, accordingly, and particularly in light of the amount of exceptions to disclosure authorised, measures could and should have been adopted internally to trigger such review long before the issuance of the Decision, including before the Chamber was constituted. In this regard, the Single Judge recalls that it is the disclosing party's ongoing obligation to review the redactions applied to ensure that they remain justified²³ and further clarifies that this obligation also applies to any other forms of exceptions to the rule that disclosable material shall be served in full.
13. In line with its obligations pursuant to Article 68(1) of the Statute, having in mind the broader security concerns, and since most of the redactions under review were applied as a result of risks posed to the safety and security of witnesses, their relatives, or other individuals assessed to be at risk, the Single Judge further considers that a variation of the Time Limits set is warranted to protect the various interests at stake. An extension of time will notably assist in avoiding that mistakes are made and in ensuring consistency when applying redaction, particularly for lengthy and at times repetitive documents. Moreover, the Single Judge notes that the additional time will facilitate further progress being made in relation to the protection arrangements and, as submitted by the

²² Prosecution Request, ICC-01/12-01/18-552-Red2, paras 39-40.

²³ Decision, ICC-01/12-01/18-546, para. 18.

Prosecution, ‘increase the likelihood of protection arrangements being implemented, which might obviate the need to apply for delayed disclosure’.²⁴

14. Turning to the length of the extension of time sought, the Single Judge notes that the deadlines set, particularly for the filing of applications for delayed disclosure by the Prosecution, must allow sufficient time for meaningful litigation to take place prior to the full disclosure deadline, if needed. Being satisfied that it would provide enough time to conduct the required tasks and adequately protect the competing interests at stake, the Single Judge finds it appropriate to extend the Time Limits to 10 March 2020. As found below, such a short extension of time will thus have no impact on the full disclosure deadline and, consequently, the start of trial.
15. The Single Judge however insists that, as indicated in the Decision, disclosure is to take place on a rolling basis and at the earliest opportunity.²⁵ The Single Judge notes the Prosecution’s commitment in this regard and, as noted above, welcomes the Prosecution’s submission that it has already taken appropriate measures to prioritise the review.²⁶ Accordingly, it is the Single Judge’s understanding that part, if not most, of the required disclosure and re-disclosure will have already taken place by the time the initial deadlines are reached.
16. It goes without saying that the Prosecution is to comply with all of its disclosure obligations by the date set for full disclosure to be effected, that is no later than 14 April 2020.²⁷ This includes any disclosure or re-disclosure required under Rule 77 of the Rules of procedure and evidence and Article 67(2) of the Statute. With regard to the Defence submission and concern that the Prosecution is not responding to its *inter partes* requests related to the abovementioned material,²⁸ the Single Judge instructs the parties to make a further attempt to resolve this matter *inter partes*. In the event this cannot be solved via *inter partes* discussions, the parties will be in a position to raise this issue during an

²⁴ Prosecution Request, ICC-01/12-01/18-552-Red2, para. 37, with paras 34-36.

²⁵ Decision, ICC-01/12-01/18-546, notably para. 8 and p. 10.

²⁶ Prosecution Request, ICC-01/02-01/18-552-Red2, paras 38-40.

²⁷ Decision Setting the Commencement Date of the Trial, ICC-01/12-01/18-548, para. 8.

²⁸ See Response, ICC-01/12-01/18-554-Red, paras 30-36 and its Annexes A and D (ICC-01/12-01/18-554-Conf-Exp-AnxA and ICC-01/12-01/18-554-Conf-Exp-AnxD).

upcoming status conference, which the Single Judge decides to hold on 18 February 2020.

17. An agenda for this status conference will be issued in due course. For this purpose, parties and participants are invited to submit via email any proposal for items to be included on the agenda by 11 February 2020.
18. In sum, recalling that disclosure shall in any event be effected on a rolling basis and at the earliest opportunity, and emphasising that the deadline for full disclosure and the start date for trial remain unchanged, the Single Judge is of the view that the present decision granting a short extension of time for selected intermediary disclosure deadlines does not prejudice the fair and expeditious conduct of proceedings. Notably, the Single Judge considers that the extension of time granted will not unduly prejudice the rights of the accused to conduct effective investigations and to make the necessary preparations prior to the start of trial in July 2020 or the calling of the first Prosecution witnesses scheduled for the end of August 2020.
19. Finally, in light of the above, the Single Judge considers that the Defence's request for Mr Al Hassan to be released pursuant to Article 60(4) due to inexcusable delay by the Prosecutor is without basis.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

PARTIALLY GRANTS the Prosecution Request;

EXTENDS the Time Limits to 10 March 2020;

REJECTS all other requests;

SCHEDULES a second status conference for 18 February 2020; and

INVITES the parties and participants to submit any proposal for agenda items via email by 11 February 2020.

Done in both English and French, the English version being authoritative.

A handwritten signature in grey ink, appearing to read 'K. Prost', is written over a horizontal line.

Judge Kimberly Prost, Single Judge

Dated this Wednesday, 22 January 2020

At The Hague, The Netherlands